HEWITSONS MEDIATION

What is mediation?

Mediation is assisted negotiation. It is a procedure in which the parties to a dispute agree to invite a neutral person (a mediator) to assist them in finding a basis; terms on which the case can be settled, so as to avoid formal proceedings or a trial. The process is voluntary and confidential and is conducted on a "without prejudice" basis. The parties control whether a settlement is reached and the terms of any compromise.

The mediator's role

The mediator will be someone independent of the parties and should have relevant knowledge and skills to assist the parties. It is important to the prospects of success of the mediation that the parties trust the mediator. That trust will normally be achieved by appointing an experienced and 'accredited' mediator – someone who has been specifically trained for the purpose and has already conducted a number of mediations successfully.

The mediator does not make a decision in relation to the dispute and should not be expected to express an opinion on the merits of the parties' respective legal cases. He does not adjudicate on the issues, and will not issue a judgment. He will explore the issues (both legal and non legal) with the parties and help each of them to test their positions against the range of possible outcomes. In this way the parties can make informed assessments of the risks they face if the dispute continues. The mediator's job is to help the parties to find common ground – a bridge to agreement.

He is usually (although not necessarily) engaged through a recognised mediation service provider. Whilst some mediators are drawn from the legal profession or even the judiciary, there is no requirement for the mediator to be legally qualified. Many are not. Depending on the case, it may be helpful for the mediator to have knowledge of the subject matter involved, particularly if technical matters are in dispute. This is not essential however. The mediation is not a trial and the mediator should not therefore be expected to have analysed all the evidence in the case.

How does mediation work?

■ Pre-mediation

The parties will need to agree who is to be the mediator (and his fee), the venue (usually neutral), the date of the mediation and how long it should be scheduled for (in commercial mediations, usually a day).

If both parties agree to mediate, a mediation agreement is drawn up (commonly through the organisation providing the mediator) which covers matters such as confidentiality and the costs of the process. It is usual for each party to bear their own costs of representation at the mediation and for the costs of the mediator and of the venue to be shared. The parties may agree in advance that if the mediation is unsuccessful, the costs will form part of the costs of the claim.

The mediator will expect to be briefed by the parties ahead of the mediation. There are no rules about what information and documents should be provided to the mediator before the mediation. He will receive the information on a confidential basis.

Whilst this will not always be the case, it can be helpful for the parties to agree a bundle of papers for the day, so everyone is working from the same information about the case.

In every case however it is useful for the mediator to be provided with a concise statement of a party's

case and position. These statements may be exchanged with the other party or parties. Additionally, a mediator may be provided with a confidential supplemental statement of information that may assist him in his role, but which he asked not to disclose to the other side.

On the day of mediation

Each party needs to be represented by someone with authority to reach a binding settlement of the dispute. In a commercial mediation, it is also usual for the parties to be legally represented.

The mediation commences with the mediator introducing himself to each party privately and explaining the confidential nature of the process, his role and how the mediation can be expected to proceed. Usually the mediator will convene an opening joint session where each party is invited to make a short statement of its position directly to the other. This statement may include the main points the party will be making in the case, but should usefully include information about the parties' objectives and commercial considerations that may be relevant to the case.

The parties may typically then retire to separate rooms whereupon the mediator will sit down with each party in turn, to discuss their respective positions. He will shuttle between the parties' rooms, seeking to progress negotiations. The mediator may ask the parties (or a representative or representatives of them) to come back together for a joint session if he thinks this will assist in moving discussions towards agreement.

Anything said to the mediator by a party (including any offer to settle) is confidential unless the mediator is given permission to disclose it to the other side.

If terms of settlement are agreed, these will be documented in a settlement agreement which should be drafted and signed by the parties at the end of the mediation day.

After mediation

If a settlement is not reached at the mediation, but the parties wish to continue to negotiate, they may agree to enlist the assistance of the mediator in those discussions.

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